Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

RICHARD L. SCOTT,

Petitioner,

v.

WARDEN GAERINGER,
RIVERS CORRECTIONAL INSTITUTE,

Respondent.

On Appeal from the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Sidney F. Wheeler
Patricia M. Peters
LONG, WEINBERG, ANSLEY & WHEELER
999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309
(404) 876-2700

Attorney for Petitioner
Richard L. Scott

65pp

I. QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner's sixth amendment rights were violated by the trial court's denial of Petitioner's Motion for Individual Voir Dire and Sequestration of Jurors?

2. Whether the trial court violated Petitioner's sixth amendment right to trial by an impartial jury by failing to disqualify the entire jury panel following a juror's prejudicial remarks during voir dire?

3. Whether Petitioner was denied effective assistance of counsel because of trial counsel's failure to place evidence before the trial court to support Petitioner's motion for change of venue?

4. Whether Petitioner was denied his constitutional right to a trial by an impartial jury by the denial of his motion for change of venue?

5. Whether the trial court's refusal to appoint an independent psychiatrist rendered the Petitioner's trial fundamentally unfair?

6. Whether Petitioner was denied effective assistance of counsel on the basis that his trial counsel failed to make the required preliminary showing to the trial court that Petitioner's sanity would be a significant factor at trial?

7. Whether Petitioner was denied effective assistance of counsel because of his trial counsel's failure to subpoena character witnesses to support a good character defense in mitigation of punishment and in support of an insanity defense?

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IV. OPINIONS BELOW

The opinion and judgment of the Georgia Court of Appeals, reported at 177 Ga. App. 474, 339 S.E.2d 718 (1985), is reprinted as Appendix A. It affirms Petitioner's convictions on all counts. Certiorari was denied by the Georgia Supreme Court on January 17, 1986.

The Report and Recommendation on Petition by State Prisoner for Writ of Habeas Corpus issued by U.S. Magistrate Allen L. Chancey, Jr. on February 6, 1992 is reprinted as Appendix B. Judge Chancey recommended denial of Petitioner's Federal Habeas Corpus Petition.

The Order of U.S. District Court Judge G. Ernest Tidwell filed July 17, 1992 is reprinted as Appendix C. This Order adopts U.S. Magistrate Allen L. Chancey, Jr.'s Report and Recommendation and denies Petitioner's Federal Habeas Corpus Petition.

The December, 1992 Order of U.S. District Court Judge G. Ernest Tidwell is reprinted as Appendix D. This Order denies Petitioner's Motion for a Certificate of Probable Cause.

The August 19, 1993 Order of the United States Court of Appeals is reprinted as Appendix E. This Order grants Petitioner's Application for a Certificate of Probable Cause.

The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit dated February 16, 1995 is reprinted as Appendix F. This opinion and judgment affirms Judge G. Ernest Tidwell's July 17, 1992 Order denying Petitioner's Federal Habeas Corpus Petition.

V. STATEMENT OF JURISDICTION

The judgment of the Court below was entered on February 16, 1995. App. p. F1. Rehearing was not sought. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1), 2241(a), 2254.

VI. STATEMENT OF CONSTITUTIONAL PROVISIONS

1. The fifth amendment, United States Constitution, which provides in pertinent part that "[n]o person ... shall be deprived of life, liberty, or property, without due process of law...."

2. The sixth amendment, United States Constitution, which provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... and to have the Assistance of Counsel for his defence."

3. The fourteenth amendment, United States Constitution, which provides in pertinent part that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law...."

VII. STATEMENT OF THE CASE

A. Course of Proceedings Below.

Petitioner was indicted during the November, 1984 Term in Troup County, Georgia on four counts of kidnapping, two counts of armed robbery, one count of aggravated assault, and two counts of burglary. App. p. B1. Petitioner was tried beginning February 18, 1985. Following a jury verdict of guilty on all counts, Petitioner received two consecutive life sentences for the two armed robberies and twenty years on each of the seven remaining counts. App. pp. B2, B6.

Petitioner's convictions and sentences were affirmed on direct appeal. *Scott v. State*, 177 Ga. App. 474, 339 S.E.2d 718 (1985). App. pp. A1-A5. Certiorari was denied by the Georgia Supreme Court on January 17, 1986. App. p. B6. Petitioner then filed a State Habeas Petition pursuant to which a hearing was held in Tatnall County, Georgia on September 26, 1988. App. p. B6. The State Habeas Court denied habeas relief to the Petitioner in an Order dated December 8, 1988. App. p. B6. The Supreme Court of Georgia denied Petitioner's Application for a Certificate of Probable Cause to Appeal on March 1, 1989. App. p. B6. This exhausted Petitioner's state court remedies.

Petitioner filed a Petition for Federal Habeas Corpus Relief setting forth ten grounds on April 4, 1991. App. p. B6. On February 7, 1992, U.S. Magistrate Allen L. Chancey, Jr. issued a report and recommended that the Federal Habeas Petition be denied. App. pp. B1-B18. On July 17, 1992, Judge G. Ernest Tidwell entered an Order adopting the Magistrate's report and recommendation and denied Petitioner's Federal Habeas Corpus Petition. App. pp. C1-C4.

On August 14, 1992, Petitioner filed a Notice of Appeal from the District Court's Judgment and Order. Simultaneously, Petitioner applied for a Certificate of Probable Cause. Judge Tidwell denied this Application for a Certificate of Probable Cause in December, 1992. App. D1-D2. Thereafter on August 19, 1993 the United States Court of Appeals for the Eleventh Circuit issued an Order granting Petitioner's Application for a Certificate of Probable Cause. App. p. E1. On

February 16, 1995 the United States Court of Appeals for the Eleventh Circuit affirmed the denial of Petitioner's Federal Habeas Corpus Petition. App. p. F1.

B. Statement of Facts

Petitioner was arrested on October 16, 1984. Shortly after his arrest and return to Troup County, Georgia, his counsel entered into a stipulation with the District Attorney's Office to obtain a psychiatric examination. The Petitioner was tested by a state psychologist, Dr. Donald Grigsby. Dr. Grigsby stated that Petitioner had a history of mental problems, a very vague sense of paranoia, and several character and personality disorders, but that he was competent to stand trial and was legally accountable for his actions at the time of the events, as he knew right from wrong and there was no evidence of delusional compulsion. App. p. B5.

On February 11, 1985, new counsel for Petitioner, attorneys Hasty and Seals, filed a motion for appointment of a psychiatrist to again inquire into both sanity and competency. The trial court denied this motion on February 13, 1985. App. p. B5.

Petitioner's new counsel also filed a motion for individual voir dire and sequestration of jury voir dire. In ruling on this motion, the trial court allowed individual voir dire but denied the request that jurors be sequestered in voir dire. App. p. B5. In reaching this decision, the court stated:

> I'm not going to allow the jury to be questioned out of the presence of one another. One of the problems here is we have no where [sic] to send the jury. We have only one courtroom. This is an old courthouse, and there is no additional courtroom. There's only one courtroom and either the jury stay [sic] here or goes out on the street and here it is February and it's a little cold out there in the street for the jury to be out there. I'm not going to grant it and I think jurors can answer questions. I've seen it done many times,

many ways and I don't see any problems with it. I'm going to deny this motion.

Counsel for Petitioner then pointed out to the court that the grand jury room was available for the purpose of individually questioning jurors out of the presence of one another. The court's response was, "You've made your statement. I'm still denying it."

By way of motion for change of venue, App. p. B5, Petitioner stated:

1. At least three major newspapers in the area of Troup County, Georgia and surrounding counties have published and circulated newspaper articles describing the acts with which defendant is charged, and these newspapers included significant portions of documentary and hearsay evidence relative to defendant, the admissibility of which has not been considered by this honorable court. This information has severely prejudiced defendant.

2. Similar publicity was broadcasted over the radio and television in Troup County and the surrounding areas describing the acts with which defendant is charged.

3. The alleged victims were well known citizens and property owners in this county with high public visibility and these crimes evoke great passion and prejudice in this community.

4. The reference to the charges pending against defendant and to defendant's background has placed before the prospective jurors in this case information which is incompetent as evidence in this case and severely prejudiced prospective jurors against defendant.

5. To try the defendant in Troup County, where the community feeling is strongly set against him, will violate his right to a fair trial by an impartial jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

At the hearing on this motion, the court instructed counsel as follows:

> Here is what I would suggest. You can present what facts you want to present and what argument you want to present now. If the presentation is so persuasive and convincing that I can grant it now, I'll grant it now. Otherwise, I reserve my ruling and will rule after the voir dire has been completed at the trial of this case Monday, based on how the jurors answer the questions on the voir dire. Then, after all of the jurors have answered the questions, before a jury is selected, you will be given an opportunity to renew your motion and the motion will be formally ruled on. I would like to have whatever evidence you might want to hear at this point, now. I like to hear that now and then I may rule today, if it is strong enough. I don't know. Of course, the courts of this state do not follow the doctrine of presumed prejudice then most of the decisions granting change of venue was based on jurors responding, answering questions during the voir dire process. But I will be glad to hear at this time if you are able to do so whatever evidence you want to argue on that Motion. If it is strong enough, I might grant the motion here stay.

In response to this invitation from the court, counsel for Petitioner responded that:

> Your Honor, we are not really prepared to argue this motion thoroughly because we don't have the evidence to put up on the witness stand and be [sic] merely my argument.

The court then invited counsel to tell him what evidence counsel anticipated presenting. Counsel stated:

> We anticipate gathering the evidence on these: the amount of publicity that was generated in this case concerning the newspaper articles, concerning action taken by the Sheriff's Department, by law enforcement agencies about the instance and nature of roadblocks being established where everybody in Troup County was going and coming from Grantville were stopped and this is the type we are going to develop and be in concert with voir dire of the jury.

The court agreed that submitting this evidence would be appropriate:

> I will agree that that would be a good idea. The way it should be done, you should come in and present whatever evidence you would like, newspaper articles, radio broadcast [sic]: If you have John Q. citizen to testify that he thinks the man can't get a fair trial in Troup County; whatever you've got, that should be heard today, then that evidence can be tendered to the court and be considered by the court in its final ruling. If the evidence is persuasive I'm liable to grant it today. You may want to ask the jurors these questions. And if the evidence is strong enough, we wouldn't have to come in and even bother with the jury in the first place. Now, if the evidence is not strong, you may want to hear jurors and hear what they have to say and then have a ruling on it.

Petitioner's trial began on February 18, 1985. During voir dire, the court asked the panel, "Ladies and gentlemen, have any of you read or heard anything about this case? If so, please raise your right hand." By the court's own count, 42 of the 51 members of the panel had heard or read something about the case. A juror had previously formed opinions about the case. Of those, five of the panel could not lay aside these opinions and were dismissed for cause.

During collective voir dire, one of the jurors, Jennie Stephens, told the court "[f]rom what I have heard, I believe he's guilty, but I can be proven wrong." App. p. B6. The court replied "I wanted you to answer my question, not whether you think he is guilty or not guilty." Immediately following this exchange, counsel for Petitioner moved for mistrial. Counsel pointed out to the court that this remark was made in the presence of all of the jurors, both those that were impaneled, and those that were still waiting. Counsel reminded the court that there were a great many of the panel who had heard and read about the case already.

The court denied the motion for mistrial and informed counsel that he would give curative instructions. Upon return to the courtroom, the court instructed the panel as follows:

> Ladies and gentlemen, I realize that you don't come up here in court everyday to do this for a living like some of the rest of us do. And I realize you are all here trying to do your best and Ms. Stephens, if I appear to be short with you, I apologize. We are here with a very important task and that is to make sure that the person on trial and all the people on trial receive a fair trial. Ms. Stephens, quite frankly, your remarks were very improper and should not have been made and I will instruct these jurors who are being considered as perspective [sic] jurors in this case and all other jurors in the courtroom to completely disregard Ms. Stephens remarks. What her opinion is or is not has nothing to do with whether this defendant is guilty or not guilty of what he is charged with doing and you jurors, if anyone of

> you are selected as jurors, should form your own opinion and not be influenced in any way by what Ms. Stephens opinion was or by what remarks she made and I will ask you to completely remove that from your minds, disregard it and pay no attention whatsoever to that remark.

At the conclusion of these remarks, counsel renewed the motion for mistrial. The court again denied the motion.

After voir dire was completed, the court invited Petitioner's counsel to submit other evidence in support of the motion for change of venue. However, counsel stated: "We don't have any evidence to present at this time."

The jury found Petitioner guilty on all counts. He received separate consecutive sentences on all counts. He received two life sentences for the two armed robberies and twenty years on each of the seven remaining counts. App. p. B6.

On direct appeal, Petitioner was represented by the same attorneys as had been his trial counsel. After failing to present any evidence to support the motion for change of venue as suggested by the trial court, these attorneys did not even raise the denial of the motion for change of venue on direct appeal. See App. pp. A1-A4. In support of his Federal Habeas Petition, however, Petitioner submitted eleven exhibits consisting of articles clipped from newspapers. The Federal Magistrate held that Exhibits 1 through 5 were relevant to Petitioner's claim. App. p. B16. The articles are entitled as follows:

Exhibit 1:	"Prisoner Eludes Manhunt;"
Exhibit 2:	"Deputies Find Needle In Haystack, Capture Kidnap Suspect In DeKalb;"
Exhibit 3:	"Couple's Child Kidnapped Here; Released Unharmed In Atlanta;"
Exhibit 4:	"Grand Jury Indicts Scott For Kidnapping, Assault And Armed Robbery;"
Exhibit 5:	"Kidnap Suspect Heads To Court."

These articles were never presented to the trial court by Petitioner's trial counsel in support of the motion to change venue.

VIII. SUMMARY OF THE ARGUMENT

Petitioner respectfully requests this Honorable Court grant this Petition for Writ of Certiorari because Petitioner's trial was fundamentally unfair. Specifically, Petitioner's constitutional rights were violated by the trial court's denial of Petitioner's Motion for Individual Voir Dire and Sequestration of Jurors, by the trial court's failure to disqualify the entire jury panel following a juror's prejudicial remarks during voir dire, by trial counsel's failure to place any evidence, such as the newspaper articles attached to the Federal Habeas Corpus Petition, before the trial court to support the Motion for Change of Venue, by the trial court's failure to grant Petitioner's Motion for Change of Venue, by the trial court's failure to appoint an independent psychiatrist, and by trial counsel's failure to subpoena character witnesses in support of a good character defense and mitigation of punishment in support of an insanity defense. For these reasons, Petitioner is entitled to habeas corpus relief.

IX. REASONS FOR GRANTING THE PETITION

A. The trial court erred in denying Petitioner's Motion for Individual Voir Dire and Sequestration of Jurors.

As a general rule, the "conduct of voir dire is a matter entrusted to the broad discretion of the trial judge." *Cummings v. Dugger*, 862 F.2d 1504 (11th Cir. 1989) (cits. omitted). However, the voir dire procedure used should be calculated to discover prejudice of jurors, if such prejudice is present. *Id.* at 1507. In cases of excessive pretrial publicity, "the discretion afforded the trial judge to conduct voir dire as he sees fit must be bounded by protection of the defendant's constitutional rights." *Id.* In evaluating the trial court's exercise of discretion in testing juror impartiality, the standard is whether "the procedure used created a reasonable assurance that prejudice of jurors would be discovered if

present." *Id.* In this case, the procedure used by the trial court failed to meet this test.

Because of extensive pretrial publicity, Petitioner filed a Motion for Individual Voir Dire and Sequestration of Jurors during Voir Dire. The motion stated that "individual voire [sic] dire of each juror in the presence of other jurors would inhibit each individual juror's response and would not provide an accurate profile of the biases and prejudices of the jurors." In ruling on this motion, the trial court allowed individual voir dire but denied the request that jurors be sequestered during this voir dire. The court's denial of sequestration was not based upon legal grounds. Rather, the decision was based upon convenience to the court:

> One of the problems here is there is no where [sic] to send the jury. We have only one courtroom. This is an old courthouse and there is no additional courtroom. There's only one courtroom and either the jury stay [sic] here or goes out on the street and here it is February and its a little cold out in the street for the jury to be out there.

Thereupon, counsel for Petitioner pointed out to the court that the grand jury room was available for the purpose of individually questioning jurors out of the presence of one another. The court's response was "you've made your statement. I'm still denying it."

During the ensuing voir dire, the court asked the panel: "Ladies and gentlemen, have any of you read or heard anything about this case, if so, please raise your right hand." By the court's own count, 42 of the 51 members of the panel had heard or read something about the case. Even though 82% of the panel had been exposed to pretrial publicity, the court did not allow sequestration and individual questioning to find out what the prospective jurors had heard. Rather, the court simply asked if the members of the panel had formed an opinion about the case. Eight jurors had formed opinions. The court asked these individuals whether they would lay aside those opinions and render a fair and impartial verdict. Five of the panel could not lay aside those opinions and were dismissed for cause.

Petitioner submits that the trial court's approach to voir dire was improper and constitutionally inadequate such that Petitioner was denied a fundamentally fair trial. The due process clause of the 14th Amendment "safeguards a defendant's 6th Amendment right to be tried before 'a panel of impartial, indifferent jurors.'" *Coleman v. Kemp*, 778 F.2d 1487, 1489 (11th Cir. 1989) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)).

The former Fifth Circuit has held that "in a case where the jurors had been exposed to some pretrial publicity, simply asking members of the jury panel to indicate by a show of hands whether the publicity would impair their ability to render an impartial decision did not adequately protect the defendant's constitutional rights." *Id.* at 1507-08 (citing *United States v. Davis*, 583 F.2d 190, 196 (5th Cir. 1978)). As recognized by this Court, the "preferred approach . . . is to conduct individual examinations of the jurors." *Cummings v. Dugger*, at 1508. "Individual voir dire allows the trial court to probe the effect of adverse publicity on the juror and insulates the jurors for one another's prejudicial comments. *Id.* (emphasis added). "[I]n situations of potential prejudice, the jurors must be questioned individually about whether they have been exposed to pretrial publicity and to what degree it has affected their decision making ability." *Id.* (citing *Jordan v. Lippman*, 763 F.2d 1265, 1281 (11th Cir. 1985)).

In this case, prospective jurors were examined in the presence of one another. Considering the extent of pretrial publicity, voir dire should have followed the guidelines recommended by this Court and the ABA:

> If there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to exposure shall take place outside the presence of other chosen and prospective jurors.

Coleman v. Kemp, 778 F.2d 1487, 1542 (11th Cir. 1985) (quoting ABA Standard for Criminal Justice, § 8-3-5(a) (2d ed. 1980)).

Even though the jurors pledged impartiality, the United States Supreme Court has recognized that a prospective juror's declarations before other panel members that he will be fair and impartial is particularly suspect: "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father." *Irvin v. Dowd*, 366 U.S. 717, 728 (1961).

In this case, individual voir dire without sequestration was of no benefit. The whole purpose of individual voir dire is to probe the effects of adverse publicity while other jurors are insulated from one another's prejudicial comments. *Id.* Where the panel members are not sequestered, counsel cannot probe for risk of tainting the panel. Further, where as here, a motion for change of venue hangs in the balance, counsel must be able to delve into the details of the panel's exposure to pretrial publicity. However, where there is a risk of tainting the pool, counsel cannot venture into these issues. Accordingly, the failure to sequester ties counsel's hands so that counsel cannot make an adequate inquiry into the extent of the exposure to pretrial publicity and its effects on the pool.

This "tying of counsel's" hands is apparent in the type of voir dire which took place. "[P]rospective jurors were not asked questions which were calculated to elicit the disclosure of actual prejudice, the degree to which the jurors had been exposed to prejudicial publicity and how such exposure had affected jurors' attitudes towards the trial." *Coleman* at 1542. Instead, the voir dire involving leading questions and conclusory answers that were not effective at rooting out undisclosed prejudice.

In this case, Petitioner should have been allowed individual, sequestered voir dire. The Court's refusal to allow this (on nonlegal grounds) prevented Petitioner's counsel from delving into the details of the extensive pretrial publicity, hampered Petitioner's presentation of a motion for change of venue, and prevented Petitioner from determining the prejudice of jurors. Due to this denial, Petitioner was denied a fair trial before an impartial jury.

B. The trial court erred in failing to disqualify the entire jury panel following a juror's prejudicial remarks during voir dire.

During collective voir dire, the Court asked the panel as a group to indicate by a show of hands whether they had formed an opinion about the case. In response to this, one of the jurors, Jennie Stephens, replied "[f]rom what I have heard I believe he's guilty but I could be proven wrong." Immediately following this prejudicial remark, the Court and counsel adjourned to chambers whereupon counsel for Petitioner made a motion for mistrial. Counsel pointed out to the court that the remark was made in the presence of all the jurors, "both those that were impaneled and those still sitting there...." Counsel also reminded the Court that there were a great many of the panel who had heard and read about the case already. Because Ms. Stephens had made the statement in the presence of all the other jurors, it would prejudice the Petitioner's right to a fair trial and that a fair and impartial jury could not be selected from this panel.

The Court denied the motion and informed counsel that he would give curative instructions. Upon returning to the courtroom, the Court instructed the panel as follows:

> Ladies and gentlemen, I realize that you don't come up here in Court every day to do this for a living like some of the rest of us do. And I realize you are all here trying to do your very best and Ms. Stephens, if I appear to be short with you, I apologize. We are here with a very important task and that is to make sure that the person on trial and all the people on trial receive a fair trial. Ms. Stephens, quite frankly, your remarks were very improper and should not have been made and I will instruct these jurors who are being considered as perspective [sic] jurors in this case and all other jurors in the Courtroom to completely disregard Ms. Stephens remarks. What her opinion is or is not has nothing to do with whether this Defendant is guilty or not guilty of what

> he is charged with doing and you jurors, if any one of you are selected as jurors, should form your own opinion and not be influenced in any way by what Ms. Stephens opinion was or by what remarks she made and I will ask you to completely remove that from your minds, disregard it and pay no attention whatsoever to that remark.

At the conclusion of these remarks, counsel renewed the motion for mistrial. The Court again denied the motion.

Without question, Ms. Stephens' improper remark was inherently prejudicial and poisoned the entire panel. Specifically, Ms. Stephens' remark referenced information that was not in evidence before the Court. Ms. Stephens stated that she had reached her opinion based upon what she had heard. This would imply that there was evidence in the media reports that would indicate Petitioner's guilt. This reference to material outside of the evidence was improper.

More importantly, Ms. Stephens' comment contained a critical misstatement of law. Ms. Stephens indicated that she believed that Petitioner was guilty, but that she could be proven wrong. This court is well aware that a criminal defendant has no burden to prove that he is not guilty. Rather, the burden is on the prosecution to prove that the defendant did commit the crimes. Ms. Stephens' remark shifted this burden upon Petitioner to prove his innocence, instead of the prosecution proving his guilt and thereby tainted the jury pool.

Despite the inherently prejudicial nature of this remark, the trial court's curative instructions did not address the most harmful part of the statement. The court's instruction dealt only with disregarding Ms. Stephen's opinion. The curative instructions should have instructed the panel that in a criminal trial, a Defendant does not have to prove his innocence. Rather, the prosecution must prove the Defendant's guilt. By failing to give curative instructions addressing this erroneous and highly prejudicial statement, the trial court erred and the panel was allowed to be influenced by an incorrect statement of law. The trial court's failure to give proper curative instructions, dismiss the entire jury panel or grant

Petitioner's motion for mistrial was erroneous and deprived Petitioner of the right to a fair and impartial jury.

C. Petitioner was denied effective assistance of counsel because of trial counsel's failure to place evidence before the trial court to support the Motion for Change of Venue.

Petitioner's trial counsel erred in failing to place evidence before the trial court to support his Motion for Change of Venue thereby denying effective assistance of counsel as guaranteed by the sixth amendment to the United States Constitution. Trial counsel's performance in this regard must be assessed using the two prong test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). Petitioner must first show counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88. Petitioner must also show there is a reasonable probability that but for counsel's unprofessional errors the results of the proceeding would have been different. *Id.* 694.

The Eleventh Circuit has articulated two benchmarks for evaluating allegations of pretrial publicity and requests for change of venue. *Cummings v. Dugger*, 862 F.2d 1504, 1509 (11th Cir. 1989). The applicable benchmark to the facts of this case, presumed prejudice, requires a showing that the pretrial publicity was sufficiently prejudicial and inflammatory in that the prejudicial publicity saturated the community where the trial was held. *Coleman v. Zant*, 708 F.2d 541, 544 (11th Cir. 1983). Prejudice is presumed from pretrial publicity when pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held. *Rideau v. Louisiana*, 373 U.S. 723, 726-27 (1963). Petitioner admits that he bears the extremely heavy burden of demonstrating such a prejudice. *Cummings*, 862 F.2d at 1509. A presumed prejudice claim requires "an extensive evidentiary showing to warrant relief" and an assessment of the "totality of the circumstances." *Coleman v. Kemp*, 778 F.2d 1487, 1491 (11th Cir. 1985).

Due to the expansive pretrial publicity in this case, coupled with trial counsel's blatant failure to produce requested evidence to the trial court, prejudice should be presumed by this Court. As noted above,

Petitioner's counsel presented no tangible evidence, such as newspaper articles, in response to the trial judge's request regarding the motion for change of venue. Instead, the "evidence" presented in support of Petitioner's Motion for Change of Venue consisted only of the responses of the jurors during voir dire indicating whether they had read or heard information concerning the case and, if so, whether they had formed an opinion about the case. (Petitioner's counsel Hasty testified at Petitioner's State Habeas Corpus hearing that answers given during voir dire were relied upon because "to get a change of venue, you've got to find . . . a significant number in your panels that say they know too much and cannot give a fair and impartial trial.. . . There was no sufficiently large number who have said that they have heard enough or said anything or had heard anything about the publicity to warrant changing venue. So the Judge denied it.").

Petitioner, however, submitted eleven (11) exhibits consisting of articles clipped from newspapers in support of his Federal Habeas Petition. Although the findings of Magistrate Chancey held that only Exhibits 1 through 5 were relevant to Petitioner's present claim, these articles on their face produce an overwhelming showing in the press of Petitioner's alleged guilt, publicity calculated to provoke hostility or reflective of an atmosphere of hostility, and publication of facts not admissible at trial. These articles clearly provide evidence of a small community predisposed to finding Petitioner guilty. Had Petitioner's counsel produced to the Court the newspaper articles as heretofore described (and possibly more) as requested by the trial court and as attached to Petitioner's Federal Habeas Petition and questioned the jurors regarding the same, Petitioner would have met the presumed prejudice standard by showing that the pretrial publicity was sufficiently prejudicial and inflammatory and that the prejudicial pretrial publicity saturated the small community where the trial was held. Petitioner's counsel failed to be effective by investigating and producing said evidence in the form of newspaper articles and thereafter questioning the jurors on the same. Petitioner clearly was prejudiced because his Motion for Change of Venue was denied and he was tried and convicted on all counts.

D. The trial court erred in failing to grant Defendant's Motion for Change of Venue.

There are two standards for change of venue requests: If a petitioner claims "actual prejudice," then the trial court's finding of impartiality should be overturned only if the reviewing court finds "manifest error." Where the claim is for "presumed prejudice," the standard is a mixed question of fact and law. *Cummings v. Dugger*, 862 F.2d 1504, 1509 (11th Cir. 1989). Petitioner submits that due to the expansive pretrial publicity in this case, prejudice should be presumed by this Court.

On direct appeal, Petitioner was represented by the same attorneys as had been his trial counsel. These attorneys did not raise the denial of change of venue on direct appeal. See App. pp. A1-A5. As a general rule, Petitioner's failure to raise this ground for appeal in his direct appeal would act as a procedural bar preventing him from litigating the issue and subsequent appeals. See *Black v. Hardin*, 255 Ga. 239, 336 S.E.2d 754 (1985). However, this failure to pursue the issue on direct appeal may be excused upon a showing of cause for his failure to pursue the issue and actual prejudice from the error. *Id.* at 240. See also *Wainwright v. Sykes*, 433 U.S. 72 (1977).

"Cause" has been defined as including ineffectiveness of counsel. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Petitioner submits that the ineffective assistance of counsel was the cause that the change of venue claim was not pursued on direct appeal and that this failure of counsel should excuse Petitioner's default. At the state habeas hearing, trial counsel testified that the reason that the Judge denied the motion for change of venue was that "there wasn't a sufficiently large number [of prospective jurors] who had said that they had heard enough or said anything or heard anything about the publicity to warrant changing venue." Thus, on direct appeal, counsel was unable to pursue the change of venue claim because of counsel's own failure to produce evidence to support this claim. Petitioner submits that he should not be prejudiced by counsel's failures.

Under *Strickland v. Washington*, 466 U.S. 668 (1984), there is a two part test to determine whether the assistance of counsel has been effective. First, counsel's representation must have fallen below an objective standard of reasonableness under prevailing professional norm. Second, the Defendant must have been prejudiced by the failure. *Id.* at 694.

In the instant case, there is no doubt that counsel's failure to produce evidence in support of the motion for change of venue fell below objectively reasonable standards of conduct for an attorney. Counsel, by the motion for change of venue had indicated the need to present such evidence and had requested an evidentiary hearing. Further, the trial judge instructed counsel to come forward with such evidence. Nevertheless, counsel did not produce any newspaper articles, any witnesses, or any other evidence in support of the motion for change of venue. This conduct clearly fell below objectively reasonable standards of conduct for an attorney.

Likewise, there can be little doubt that Petitioner was actually prejudiced by this failure. Change of venue was critical in this case. Petitioner was a black man charged with serious crimes against white persons in a rural county in south Georgia. The community was incensed. Pretrial publicity was so extensive that, by the Judge's own count, 82% of the prospective jurors had read or heard something about the case. In fact, the trial court had indicated its willingness to grant a motion for change of venue so that Defendant could be tried in another county. Nonetheless, because of counsel's failure, venue remained in Troup County and Petitioner was tried before a jury that had received information from the media regarding Petitioner's case and that was prejudiced towards Petitioner. As a result, Petitioner, who had not even caused bodily injury to anyone, wound up being found guilty and sentenced to two life sentences plus 140 years in jail. Accordingly, Petitioner submits that actual prejudice resulting from counsels' failure is obvious.

Furthermore, even if the evidence of Petitioner's guilt was overwhelming, he has still suffered actual prejudice. This Court has recognized that "the law requires that even the obviously guilty are

entitled to a fair trial 'regardless of the heinousness of the crime . . . [or] the apparent guilt of the offender.'" *Coleman v. Kemp*, 778 F.2d 1487, 1543 n. 27 (11th Cir. 1985) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)).

Because of counsels' ineffective assistance, the procedural default regarding failure to directly appeal the denial of the motion for change of venue is waived. Accordingly, this Court must examine the totality of the circumstances to determine whether prejudice should be presumed.

As discussed above, Petitioner's trial counsel presented no newspaper articles or other evidence in response to the trial court's request. However, in Petitioner's Federal Habeas Petition, Petitioner submitted eleven exhibits consisting of articles clipped from newspapers. The Federal Magistrate found that five of these exhibits were relevant to Petitioner's claim. These articles only scratch the surface of the prejudicial pretrial publicity surrounding the arrest and trial of Petitioner. Yet, the articles on their face produce an overwhelming showing in the press of Petitioner's alleged guilt. Further, the articles reflect an atmosphere of hostility as well as publication of facts not admissible at trial.

The atmosphere of hostility is evident from other sources as well. Petitioner had a succession of appointed counsel because no attorney in the small community wanted to represent him. The victims in the case were well known and respected members of the community. Further, in addition to the newspaper coverage, there were numerous radio and television reports regarding Petitioner's case. Road blocks were conducted during the search for Petitioner, affecting most of the community. Finally, in a small community such as this, there is no telling what kinds of wild, unsubstantiated rumors were going around about Petitioner.

The simple fact is that in this case, the pretrial publicity was pervasive and prejudicial. The community was saturated with inflammatory publicity by newspaper, television, radio and word of

mouth. Under these circumstances, the trial court had a duty to examine this publicity and to determine the extent of any prejudicial effect.

Petitioner's trial counsel shirked their responsibility to present evidence of excessive pretrial publicity. However, equally at fault was the trial judge who made no effort to question prospective jurors individually regarding their exposure to prejudicial publicity. The obligation of the trial court was to ensure that Petitioner received a fair trial before an impartial jury, regardless of the overwhelming evidence against Petitioner.

The court failed to take any steps to examine the pretrial publicity and, in so failing, deprived Petitioner of a fundamentally fair trial. Because of the trial court's failure to examine the pretrial publicity, even though the court was aware of the pervasiveness of this publicity, prejudice should be presumed. Accordingly, the trial court erred in denying Petitioner's motion for change of venue.

E. The trial court's refusal to appoint an independent psychiatrist rendered the Petitioner's trial fundamentally unfair.

Petitioner was arrested on October 16, 1984. Shortly after his arrest and return to Troup County, Georgia, his Counsel entered into a Stipulation with the District Attorney's Office to obtain a psychiatric examination. The Court entered an Order requiring the psychiatric examination to be conducted at a facility designated by the Georgia Department of Human Resources "for purposes of observation, examination, and evaluation of his mental condition and competency to stand trial . . . and of his mental competency to distinguish between right and wrong at the time of the alleged offenses." Petitioner was tested by psychologist Dr. Donald Grigsby and the Psychologist's Report was filed with the Court. Dr. Grigsby stated that the Petitioner had a history of mental problems, a very vague sense of paranoia, and several character and personality disorders, but that he was competent to stand trial and was legally accountable for his actions at the time of the offenses, as he knew right from wrong and there was no evidence of a delusional compulsion.

On February 11, 1985, new counsel for Petitioner, Hasty & Seals, filed a Motion for Appointment of a Psychiatrist to again inquire into both sanity and competency. The trial court denied the request on February 13, 1985 and the trial of Petitioner's case began on February 18, 1985. The denial of the Motion for Independent Psychiatrist was raised in the Amendment to the Motion for New Trial and the Amendment to Motion was denied.

At a bare minimum, the trial court erred in not granting Petitioner's Motion for the Appointment of an Independent Psychiatrist as mandated in *Ake v. Oklahoma*, 470 U.S. 68 (1985) which holds that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must . . . assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id.* at 83. Under *Ake* and the facts of this case, Petitioner was clearly entitled to the appointment of an independent psychiatrist to examine him and the denial of such does not comply with due process. Petitioner's Motion for Appointment of an Independent Psychiatrist to again inquire into both sanity and competency as referenced above and made two days prior to trial sought to show that the examination conducted by Dr. Grigsby, a Psychologist and Chief of Forensic Services at West Georgia Regional Hospital, was biased because he worked for the State and further that he was a psychologist and not a psychiatrist as required by the trial court's Order. The potential and actual bias inherent in Dr. Grigsby's testimony should have at a minimum required the trial court to grant Petitioner's Motion for Appointment of an Independent Psychiatrist to inquire into both sanity and competency again as both were obviously issues at the trial. Petitioner's Motion for Appointment of Independent Psychiatrist should have in and of itself made the trial court acutely aware that the question of Petitioner's sanity at the time of the offenses would be a significant factor at trial.

F. Petitioner was denied effective assistance of counsel because trial counsel failed to make the required preliminary showing to the trial court that Petitioner's sanity would be a significant factor at trial.

Petitioner was also denied effective assistance of counsel on the basis of the decisions in *Ake v. Oklahoma*, 470 U.S. 68 (1985) and *Strickland v. Washington*, 466 U.S. 668 (1984). Ake clearly requires that a Petitioner demonstrate to the trial judge that his sanity at the time of the offense is to be a significant factor at trial. *Id.* Only when such has been accomplished is the State under an obligation to assure the Defendant access to a competent psychiatrist who will conduct an appropriate examination, and assist in evaluation, preparation, and presentation of the defense. *Id.*

Petitioner recognizes that the holding in *Ake*, does not require the appointment of a psychiatrist so the defense can go on a fishing expedition. It does require, however, the Petitioner to make a preliminary showing that his sanity at the time of the offenses in question would be a significant factor at trial. At the trial of this case counsel presented no evidence to show that Petitioner had ever been insane or severely mentally disturbed, and counsel did not offer to show the Court why the appointment of an independent psychiatrist would be helpful to the accused other than the assertion that Dr. Grigsby was biased. In addition, in the instant case, the trial court's Order requiring the Petitioner to undergo psychiatric examination had little significance in determining whether Petitioner had made the requisite preliminary showing because it was issued as a result of a Stipulation between the Defendant and the State. No other factors to indicate the presence of mental illnesses were brought before the Court.

The benchmark for judging any claim of ineffectiveness of counsel must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's performance is assessed using the two prong test enunciated in *Strickland*, *supra*. To prevail a Petitioner must show that his attorney's performance fell below an objective standard of

reasonableness. *Id.* at 688. The Petitioner must also demonstrate there exists a reasonable chance that the outcome of the case would have been different but for the attorney's mistakes. *Id.* at 694.

Effective assistance of counsel embraces adequate pretrial investigation. "When a lawyer fails to conduct a substantial investigation into any of his client's plausible lines of defense, the lawyer has failed to render ineffective assistance of counsel." *McCoy v. Newsome*, 953 F.2d 1252 (11th Cir. 1992) (quoting *House v. Balkcom*, 725 F.2d 608, 615 (11th Cir.)). Failure to investigate evidence that would be helpful to the defense is also an indication of ineffective assistance of counsel. *McCoy* at 1263; *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982).

It is evident that Petitioner's counsel presented no evidence to show the Court why the appointment of an independent psychiatrist would be helpful. Character witnesses were not called and Petitioner's military file was not put in evidence. On direct appeal, the Georgia Court of Appeals even noted that the evidence reflected that the Petitioner "had a history of mental problems, a very vague sense of paranoia, and several character and personality disorders . . ." App. p. A1. It is Petitioner's position that had his counsel made the preliminary showing at trial that his sanity at the time of the offense would be a significant factor at trial that his Motion for Appointment of an Independent Psychiatrist would have been granted and that testimony from such independent psychiatrist would have affected the outcome of the case.

G. Petitioner was denied effective assistance of counsel because of counsel's failure to subpoena character witnesses in support of a good character defense in mitigation of punishment and in support of an insanity defense.

As noted above, counsel's performance in regard to an ineffective assistance of counsel claim is assessed using the two prong test enunciated in *Strickland*, *supra*. Petitioner must first show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88. Petitioner also must show "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." *Id.* at 694.

At Petitioner's State Habeas hearing, his trial attorneys testified that they initially pursued an insanity defense, but later decided against an insanity defense because they felt the available evidence was insufficient to go forward with an insanity defense, and the Court would not appoint a second psychiatrist for an independent evaluation. Counsel additionally testified that Petitioner was not interested in pursuing an insanity defense. The findings of the Magistrate subsequently held that Petitioner's attorneys adequately investigated to determine whether to pursue a plea of insanity and reasonably concluded that the evidence did not support such a defense. Findings of the Magistrate further held that Petitioner was not prejudiced by trial counsel's failure to subpoena character witnesses in support of a defense of insanity as Petitioner had presented no evidence to show that character witnesses existed who could have testified favorably for him prior to sentencing.

Agan v. Singletary, 12 F.3rd 1012 (11th Cir. 1984), however, holds that counsel has a duty to investigate his client's competency to stand trial or plead guilty and that an attorney cannot blindly follow a client's demand that his competency not be challenged. The Court in *Agan* held that the counsel defending a prisoner charged with murder of a fellow inmate rendered ineffective assistance of counsel as he only spent seven hours conducting any sort of external investigation of the case, he never obtained prison medical files or military files which would have raised a "red flag" as to his competency and he made no independent inquiry into prisoner's psychiatric background. *Agan* at 1012.

Similarly, in the present case, there is nothing to suggest that Petitioner's counsel fulfilled his duty to investigate that such witnesses even existed who would provide testimony as to Petitioner's good character and testify favorably for him prior to sentencing. There is also nothing to show that Petitioner's counsel fulfilled their duty to investigate whether character witnesses existed who would provide favorable testimony in regard to the sentencing of Petitioner. The severe sentences Petitioner received are illustrative of the prejudice he suffered as a result. Petitioner was found guilty on all counts as charged and received separate consecutive sentences on all counts. Petitioner received two life sentences for two armed robberies and twenty years on each of the seven remaining

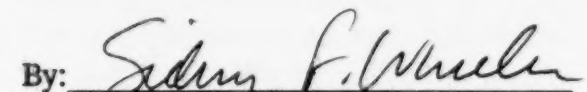
counts. The prejudice sustained by Petitioner could not be more obvious as shown by the sentences received.

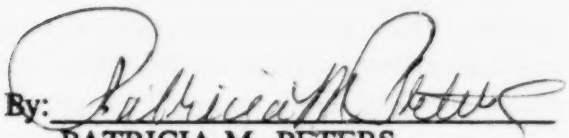
X. CONCLUSION

The evidence of record in this case and the law applied to the evidence of record show that Richard L. Scott's constitutional rights and guarantees have been violated based upon the above argument and citations of authority. Therefore, Petitioner respectfully requests that this Honorable Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

LONG, WEINBERG, ANSLEY & WHEELER

By: 
SIDNEY F. WHEELER
Counsel of Record

By: 
PATRICIA M. PETERS

999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309
(404) 876-2700

ATTORNEYS FOR PETITIONER
RICHARD L. SCOTT

APPENDIX A

71235. SCOTT v. THE STATE.
(339 SE2d 718)

DEEN, Presiding Judge.

Richard Lee Scott was convicted of four counts of kidnapping, two counts of armed robbery, one count of aggravated assault and two counts of burglary. He appeals following the denial of his motion for a new trial.

1. Scott first contends that the trial court erred in not granting his motion for the appointment of a psychiatrist, as mandated in *Ake v. Oklahoma*, 470 U.S. _ (105 SC 1087, 84 LE2d 53) (1985), a case decided approximately two weeks after his trial.

In *Ake*, the court held that "[w]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must . . . assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id.* at 84 LE2d at 66.

Scott filed his motion two days prior to trial. At the hearing on the motion, his attorney did not attempt to make a showing that his mental state at the time he committed the offenses in question would be a significant factor in his defense. He merely sought to show that an examination conducted by Dr. Grigsby, a psychologist and Chief of Forensic Services at West Georgia Regional Hospital, could be biased since he worked for the state, and that Scott should be granted the funds to hire an independent psychiatrist to examine him.

Shortly after Scott's arrest and return to Troup County, his counsel entered into a stipulation with the District Attorney's office to obtain a psychiatric examination, and the court entered an order requiring the psychiatric examination to be conducted at a facility designated by the Department of Human Resources "for purposes of observation,

examination, and evaluation of his mental condition and competency to stand trial . . . and of his mental competency to distinguish between right and wrong at the time of the alleged offenses."

Appellant was tested by Dr. Grigsby, and the psychologist's report was filed with the court. Dr. Grigsby stated that the defendant had a history of mental problems, a very vague sense of paranoia, and several character and personality disorders, but that he was competent to stand trial and was legally accountable for his actions at the time of the offenses, as he knew right from wrong and there was no evidence of a delusional compulsion. At trial Scott chose to represent himself assisted by two attorneys and called Dr. Grigsby as a witness for the defense. Dr. Grigsby testified that Scott did not suffer from mental illness, but had a character disorder in that he was "a pain to other people." He testified that he examined Scott's service records and learned that the visits to psychiatrists while in the Navy were mainly for marital and occupational problems, and that upon his discharge, Scott was diagnosed as paranoid and having occupational problems.

A review of the hearing transcript indicates that Scott was hoping that an independent examination would turn up something that would enable him to raise the insanity defense at trial. The holding in *Ake*, however, does not require the appointment of a psychiatrist so the defense can go on a fishing expedition. It requires the defendant to make a preliminary showing that his sanity at the time of the offenses in question would be a significant factor at trial. There was no evidence presented to show that Scott had ever been insane or severely mentally disturbed, and counsel did not offer to show the court why the appointment of an independent psychiatrist would be helpful to the accused other than the assertion that Dr. Grigsby was biased. In *Ake*, the defendant's behavior at arraignment was so bizarre that the judge *sua sponte* ordered a psychiatric examination, and the state psychiatrist found him incompetent to stand trial and suggested that he be committed. When the defendant was finally found to be competent to stand trial, it was only on the condition that he be sedated with powerful drugs three times a day. The psychiatrists who examined him described the severity of his mental illness less than six months after the offense and suggested that the illness might have begun many years earlier. The court also noted that

Oklahoma recognized an insanity defense under which the defendant has the initial burden of producing evidence. In the instant case, the trial court's order requiring the defendant to undergo psychiatric examination has little significance in determining whether Scott has made the requisite preliminary showing because it was issued as a result of a stipulation between the defendant and the state. No other factors to indicate the presence of mental illness in the defendant were brought before the court.

In *Lindsey v. State*, 254 Ga. 444, 449 (330 SE2d 563) (1985), the court, on motion for rehearing, set out guidelines to assist the trial court in determining whether an indigent defendant has made a preliminary showing. The court held that it can even consider such things as a defendant's out-of-court statements in determining whether the defendant has made a showing that his sanity is likely to be a significant factor in his defense. The trial court is also authorized to order a psychiatrist or another mental health expert to examine the defendant to help determine whether his sanity is likely to be a significant factor in his defense. When it is determined that it is, the defense must be provided with the assistance of a psychiatrist.

It appears that the court complied with the requirements set forth in *Lindsey*, although trial was held four months before that case was decided. We find no error.

2. Appellant further contends that the trial court committed reversible error by refusing to disqualify the entire jury panel because a prospective juror indicated she had informed an impression or opinion about the case.

During jury selection, the court asked a juror if she could lay aside her impressions or opinion and render a verdict based on the evidence presented in court. She replied: "From what I have heard I believe he's guilty, but I could be proven wrong." The court informed her it merely wanted a "yes" or "no" answer and excused her. Appellant's attorney moved for a mistrial. The court denied the motion and gave curative instructions to the prospective jurors sitting in the courtroom. Appellant again moved for a mistrial, and it was denied. The court then inquired of each panel as to whether there was any reason they

knew that they could not be fair and impartial jurors in the case. Each time, no one answered.

Appellant relies upon *Lingerfelt v. State*, 147 Ga. App. 371 (249 SE2d 100) (1978), and *Moore v. State*, 156 Ga. App. 92 (274 SE2d 107) (1980), to support his contention that the juror's remark was inherently prejudicial and deprived him of his right to begin his trial free from even a suspicion of prejudgment or fixed opinion.

In *Lingerfelt*, a juror, in an answer not responsive to any question asked, stated that he had heard too much about the case to be impartial. The trial judge questioned him as to what he had heard and from whom. The juror named several persons he knew who claimed that the defendant was a peeping tom. In *Moore*, the appellant was to be tried on two counts of arson. During voir dire, a prospective juror volunteered the information that the defendant was a volunteer fireman and that "I worked with a guy that said he was a firebug. He said that he would be the first one on the fire scene; that he would set the fire and then run back to the firehouse." In both cases this court reversed the conviction because the trial court failed to disqualify the prospective jurors who heard the inherently prejudicial statements which denied the appellants a fair trial. These cases are distinguished from the instant case because the accused's character and past conduct were not the subject of the comment. Here, the statement was not inherently prejudicial, and the court gave extensive curative instructions and then very carefully determined that the remark had no prejudicial effect. See *Ford v. State*, 154 Ga. App. 506, 507 (268 SE2d 788) (1980), wherein this court held that a juror's response to counsel's question in which he indicated he felt the defendant might be guilty did not impermissibly place the defendant's character in issue. This enumeration is without merit.

3. On September 30, 1985, appellant filed an amended brief which contains three additional enumerations of error. This case was docketed on July 12, 1985, and appellant had 20 days in which to file his enumeration of error and brief. Court of Appeals Rule 14. Accordingly, his brief and enumeration of errors was due on August 1, 1985. On July 30, 1985, however, he was given a twenty-day extension for filing these documents. Enumerations of error may not be amended after the time for

filing has expired. *Burke v. State*, 153 Ga. App. 769 (266 SE2d 549) (1980). We cannot consider the arguments contained in the amended brief because they do not pertain to the original enumeration of error. An enumeration of error may not be enlarged by brief on appeal to cover issues not contained in the original enumeration. *Tucker v. State*, 173 Ga. App. 742 (327 SE2d 852) (1985).

Judgment affirmed. Pope and Beasley, JJ., concur.

DECIDED DECEMBER 2, 1985
REHEARINGS DENIED DECEMBER 17, 1985 AND JANUARY 8, 1986
CERT. APPLIED FOR.

Kidnapping, etc. Troup Superior Court. Before Judge Lee.
Lee Roy Hasty, E. Earl Seals, for appellant.
Arthur E. Mallory III, District Attorney, for appellee.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

RICHARD L. SCOTT,	:	
	:	CIVIL ACTION
Petitioner,	:	NO. 3:91-CV-39-GET
	:	
vs.	:	REPORT AND
	:	RECOMMENDATION
	:	ON PETITION BY STATE
BARRY GAITHER, Warden,	:	PRISONER FOR WRIT OF
Ware Correctional Institution,	:	HABEAS CORPUS
	:	
Respondent.	:	

Richard L. Scott, a state prisoner currently in custody of the respondent warden, has filed this pro se petition for a writ of habeas corpus under 28 U.S.C. §2254 challenging his February, 1985, conviction in the superior Court of Troup County, Georgia, on four counts of kidnapping, two counts of armed robbery, one count of aggravated assault, and two counts of burglary, for which he received two consecutive life sentences and 140 years consecutive. Petitioner seeks federal habeas corpus relief on a number of grounds which are explained in detail below.

I. BACKGROUND FACTS

Petitioner was charged with the October 8, 1984, kidnapping, armed robbery, and aggravated assault upon Steven Bradfield; the October 8, 1984, burglary of Joe Bradfield; the October 13, 1984, kidnapping of Kimberly and Betty Hart; and the October 13, 1984, kidnapping, armed robbery, and burglary of William Hart.

Petitioner was tried before a jury for four counts of kidnapping, two counts of armed robbery, one count of aggravated assault, and two

counts of burglary beginning on February 18, 1985. The jury returned its verdict of guilty on all nine counts on February 20, 1985. (Resp. Ex. 4A at 323-26). The evidence and testimony presented at trial established the following facts concerning petitioner's acts on October 8 and October 13, 1984.

On October 8, 1984, Steven Bradfield accompanied his father Joe Bradfield to the father's house to check on the progress of a painter hired to paint the trim on the exterior of the house. (Resp. Ex. 4A at 515-53). When they arrived, they found the painter working at the front of the house, the painter's car in the yard, and a later model Chevrolet backed into the drive. The painter informed Joe that he believed the car belonged to a member of the household because he had heard noise inside the house and thought someone was home.

Joe and Steven entered the house, and Joe searched the lower level while Steven proceeded upstairs. Once upstairs Steven entered the family area and encountered petitioner. Id. at 518. Petitioner had apparently entered the house by removing a window pane in a door, unlocking the door, and replacing the pane. Id. at 560-61. Petitioner had a gun in his hand which he pointed at Steven. He pulled back the hammer and told Steven "freeze, don't even think about moving, don't make me have to kill" or a similar remark. Id. at 519. Talking in a loud voice in an attempt to warn his father, Steven said, "Don't shoot me, take whatever you want, just stay cool." Id. at 521. Joe Bradfield heard Steven, left the house, and called the police. Id. at 555-56.

Steven was forced at gunpoint to give petitioner his wallet containing $30.00 and a number of credit cards. With multiple threats of harm, petitioner forced Steven into a closet with his back to the door. While in the closet Steven could hear petitioner searching through the drawers. Id. at 523-24.

Joe called the police, obtained a .20 gauge shotgun and .38 caliber pistol, and positioned himself by a tree approximately 250 feet from his front door. Id. at 556. Petitioner came out by the front door carrying a suitcase. Joe yelled at petitioner to stop, and petitioner dropped the suitcase and re-entered the house. Id. at 558.

Petitioner then went back into the room where Steven was in the closet, told Steven he had messed the petitioner up, and loaded Joe's 30-06 rifle. Id. at 526. Petitioner, who appeared very agitated and nervous, then opened the closet door and pressed the .38 pistol against the back of Steven's head hard enough to cause pain. Id. Holding both the pistol and rifle, petitioner led Steven downstairs to a double door with a small vestibule and threatened to blow his head off if he tried anything. Id. at 526-28.

At petitioner's command, Steven opened the door and stepped out. Petitioner pulled the gun away from Steven's head. Steven then slammed the door shut and fled to the left, at which time petitioner fired the gun causing a bullet to pass through the door at Steven's eye level. Steven then ran around the house and escaped. Id. at 528-29.

Deputies arrived and entered and searched the house. However, the deputies were unable to secure the rear of the house, and petitioner was able to escape. Id. at 559-60. The suitcase and its contents were recovered and identified as property of Joe Bradfield and his wife. Id. at 563.

Five days later, on October 13, 1984, William Hart and his wife Betty returned home with their three and one-half year old granddaughter, Kimberly. William walked into his son's bedroom and was met by petitioner who had apparently entered the home by ripping out part of the window screen, reaching in and unlocking the screen, and climbing through the window. Id. at 570, 588. Petitioner pointed a handgun at Mr. Hart's face and a shotgun at his waist and motioned for him to move to another room, where petitioner forced the Harts to sit down. Id. at 570-71, 588. Mrs. Hart asked "are you Scott?" Petitioner responded by stating he did not want to hurt them but would if they did anything stupid. Petitioner then asked if he had hurt anyone earlier that week. After being informed that no one had been hurt, petitioner forced Mrs. Hart to go to another room with him and get a suitcase. Id. at 571-72.

Petitioner then said "we're going to take a little ride" and forced the Hart family to get into the car. Id. at 573-74. He forced Mr. Hart to place the suitcase and some groceries in the trunk, placed Mr. and Mrs.

Hart in the front seat, and placed the child in the back seat with him. (Id. at 574; Resp. Ex. 4B at 673-74). Petitioner held the pistol and laid the shotgun on the floorboard with the barrel pointing toward the child. (Resp. Ex. 4A at 575; Resp. Ex. 4B at 676). At one point petitioner became agitated and stomped a box of tissue, a box of baby wipes, and an umbrella that lay on the floorboard. (Resp. Ex. 4A at 574; Resp. Ex. 4B at 674).

Petitioner forced Mr. Hart to drive from LaGrange to Atlanta. During the trip petitioner forced Mr. Hart to hand over his wallet. Petitioner took all the money, about $130.00, and inquired as to the status of all of Mr. Hart's credit cards. He later gave $70.00 back to Mrs. Hart. (Resp. Ex. 4A at 57879; Resp. Ex. 4B at 679-81). Near Atlanta petitioner forced Mr. Hart to drive to a phone booth. (Resp. Ex. 4A at 582; Resp. Ex. 4B at 684). Petitioner ordered Mrs. Hart out of the car and took the car keys from Mr. Hart. Id. Petitioner had earlier denied Mrs. Hart's request to hold Kimberly as they rode, but now allowed her to take Kimberly. (Resp. Ex. 4A at 582; Resp. Ex. 4B at 680, 685). Petitioner then forced Mr. Hart to roll down all the car windows and place his hands on the steering wheel while Mrs. Hart and her granddaughter were made to stand between the car and the phone booth. (Resp. Ex. 4A at 582-83; Resp. Ex. 4B at 684).

After making two telephone calls, petitioner ordered Mrs. Hart and Kimberly back into the car and forced Mr. Hart to drive back and forth past the phone booth. (Resp. Ex. 4A at 583-85; Resp. Ex. 4B at 686-87). Eventually petitioner ordered Mr. Hart to turn into a side street and immediately turn into the driveway of a house. (Resp. Ex. 4A at 585). Petitioner forced everyone to place their heads on their knees and again repeated his earlier warning that if they did anything stupid, they knew what he would do to them. Petitioner took the car keys and opened the trunk. (Resp. Ex. 4A at 585-86). Petitioner then got into a car that had pulled up behind the Harts' car, and the car sped away. (Resp. Ex. 4A at 586).

Several items of property were taken from the Harts' home. Kimberly was traumatized and, at the time of trial, continued to have nightmares. (Resp. Ex. 4B at 623).

A few days later petitioner was arrested in Decatur and returned to Troup County. Defense counsel and the prosecutor stipulated to an evaluation of petitioner by Dr. Donald Grigsby, Chief of Forensic Services at West Georgia Regional Hospital, who found petitioner both competent to stand trial and sane at the time of the offenses. Dr. Grigsby testified that he found petitioner able to distinguish right from wrong and found no evidence of a delusional compulsion. He noted that petitioner did have a character disorder, but did not suffer from a mental illness. (Resp. Ex. 4A at 425-26; Resp. Ex. 4B at 754).

Petitioner testified at trial and admitted breaking into Joe Bradfield's house to "retrieve anything being of monetary contribution to me to aid me in survival." (Resp. Ex. 4B at 822-40). He claimed that he did not intend to harm Steven Bradfield and fired the gun only to scare off anyone nearby before escaping by the back of the house. Id. at 843-44. Petitioner claimed he only entered the Harts' home to get some shoes and clothing, that he identified himself to the Harts when they came home, and that he told them he was in trouble and requested assistance in getting somewhere that he could contact friends and family about pending legal matters. Id. at 847-48. Petitioner admitted taking money from Mr. Hart but claimed he intended to repay the Harts and that he gave them an I.O.U. Id. 851-54.

On February 13 and February 15, 1985, the trial court held hearings to consider various motions by the petitioner. (Resp. Ex. 4A at 416-54). At the preliminary hearings and at trial petitioner was represented by attorneys Lee Hasty and Earl Seals. Petitioner's counsel made motions for appointment of an independent psychiatrist, to suppress evidence of an escape, and for change of venue. The court denied petitioner's motion for appointment of an independent psychiatrist. Id. at 427. The court ruled that the fact that petitioner had escaped was admissible but that the details of his escape were not. Id. at 430. At Mr. Hasty's request, the court deferred ruling on petitioner's motion for change of venue until after voir dire of the jury. Id. at 433.

Petitioner's trial began on February 18, 1985, and continued through February 20, 1985. Petitioner's counsel filed a motion for individual voir dire and sequestration of jurors during voir dire. Id. at

457. The court ruled that the attorneys could ask the jurors individual questions but that he would not allow sequestration Id. at 458. One juror, Jennie Stephens, volunteered the statement that "from what I have heard, I believe he's guilty but I could be proven wrong." Id. at 468. Petitioner's trial counsel moved for a mistrial on the ground that the juror's remark was prejudicial. Id. at 468-70, 478-79. The court denied petitioner's motion and issued corrective instructions to the jury. Id. at 470, 478-79, 490. At the conclusion of voir dire, petitioner's motion for change of venue was considered by the trial court and denied for insufficient evidence. Id. at 501-04.

The jury found petitioner guilty on all counts. Resp. Ex. 4B at 948-49. Petitioner received separate consecutive sentences on all counts. He received two life sentences for the two armed robberies and 20 years on each of the seven remaining counts. The convictions and sentences were affirmed on direct appeal. Scott v. State, 177 Ga. App. 474, 339 S.E.2d 718 (1985). Certiorari was denied by the Georgia Supreme Court on January 17, 1986.

Petitioner then filed a state habeas petition pursuant to which a hearing was held in Tattnall County, Georgia, on September 26, 1988. (Resp. Ex. 4, 4A, 4B). The state habeas court denied habeas relief to the petitioner in an order dated December 8, 1988. (Resp. Ex. 2). The Supreme Court of Georgia denied petitioner's application for a certificate of probable cause to appeal on March 1, 1989. (Resp. Ex. 3). Thereafter, petitioner filed this petition for federal habeas corpus relief, setting forth 10 grounds. After respondent contested exhaustion as to one ground, petitioner elected to delete that ground and proceed with his remaining claims.

Petitioner seeks federal habeas corpus relief on the following nine-grounds:

(1) The trial court erred in denying petitioner's motion for change of venue due to pervasive pretrial publicity throughout the community.

(2) The trial court erred by denying petitioner's motion for a mistrial following remark by juror during voir dire that she believed petitioner was guilty but could be proven wrong, which was heard by other jurors because the court denied sequestration of the jury during individual voir dire.

(3) Trial court erred by denying petitioner's motion for appointment of an independent psychiatrist.

(4) The trial court erred in denying petitioner's motion for change of venue due to pervasive pretrial publicity throughout the community.

(5) Ineffective assistance of counsel in that his trial attorneys failed to place evidence before the court to support his motion for change of venue.

(6) The trial court erred by failing to disqualify the entire jury panel and grant a mistrial following remark by juror during voir dire that she believed petitioner was guilty but could be proven wrong, which was heard by other jurors because the trial court denied sequestration of the jury during individual voir dire.

(7) Trial court erred by denying petitioner's motion for appointment of an independent psychiatrist.

(8) Ineffective assistance of counsel in that his trial attorneys failed to subpoena character witnesses for use to present a good character defense in mitigation of punishment and in support of an insanity defense.

(9) Ineffective assistance of counsel in that his trial attorneys failed to notify the court that two jurors had slept during the trial.

Respondent concedes that petitioner has exhausted these grounds by raising grounds two, three, six, and seven in the direct appeal of his convictions, and by raising the remaining grounds in his state habeas corpus petition.

The matter is presently before the Court on the petition, respondent's answer-response and attached exhibits, petitioner's reply, and briefs of the parties. The Magistrate Judge has made a full review of the record and finds that it contains sufficient facts upon which the issues under consideration may be properly resolved and that petitioner was afforded a full and fair hearing in state court. Therefore, no further evidentiary hearing is required upon these issues. *Townsend v. Sain*, 372 U.S. 293 (1963); *Stano v. Dugger*, 901 F.2d 898, 899 (11th Cir. 1990) (en banc).

DISCUSSION

A. Denial of Change of Venue

Petitioner alleges in grounds one and four that the trial judge abused his discretion in denying his motion for a change of venue. Petitioner's motion was based on allegations of adverse pretrial publicity so pervasive it created an inherently prejudicial atmosphere. Petitioner contends that the denial of his motion unconstitutionally deprived him of his right to a fair and impartial trial.

The state habeas corpus court found that petitioner's trial counsel filed a motion for change of venue claiming that petitioner could not receive a fair trial due to the prejudice of individual jurors, but that the trial court's denial of this motion was not pursued on direct appeal. (Resp. Ex. 4). The state habeas court held that petitioner's failure to pursue the issue on appeal precluded consideration by the state habeas court absent a showing of cause and actual prejudice. *Black v. Hardin*, 255 Ga. 239, 336 S.E.2d 754 (1985). The petitioner has shown neither actual cause nor prejudice to him. *Id.*

Under Georgia law, the "failure to make a timely objection to any alleged error or deficiency or to pursue the same on appeal ordinarily

will preclude review by writ of habeas corpus." *Black*, 255 Ga. at 240, 336 S.E.2d at 755. (emphasis in original). This Circuit has held that where the state court correctly applies a procedural default principal of state law, a federal habeas court is required under *Wainwright v. Sykes*, 433 U.S. 72 (1977), to abide by the state court's decision. *Harmon v. Barton*, 894 F.2d 1268, 1270 (11th Cir. 1990). A habeas petitioner generally may not evade an otherwise valid procedural bar except by showing cause for and actual prejudice from the default. *Id.* "[In the] extraordinary case where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray v. Carrier*, 477 U.S. 478, 495 (1986).

On direct appeal to the Georgia Court of Appeals, petitioner, acting through counsel, raised only two claims: failure of the trial court to grant petitioner's request for appointment of an independent psychiatrist, and failure of the trial court to disqualify the entire jury panel following a remark by a prospective juror indicating that she had formed an opinion about the case and believed petitioner was guilty. *Scott*, 177 Ga. App. 474, 339 S.E.2d 718 (1985). Acting pro se, petitioner filed an amended appeal brief on September 30, 1985, containing three additional claims. The Georgia Court of Appeals held that petitioner's claims in his amended brief could not be considered because his brief was filed after expiration of the time allowed for filing, citing, *Burke v. State*, 153 Ga. App. 769, 266 S.E.2d 549 (1980). However, petitioner's amended brief also did not include a claim that the trial court erred by failing to grant his motion for change of venue.

Petitioner did make this claim in his state habeas petition. However, petitioner made no particularized showing of cause for and prejudice from the default at the state habeas proceedings.

In his traverse, petitioner now addresses the procedural default issue and the prejudice requirement, but offers no evidence to show cause for his failure to raise this claim in his direct appeal to the Georgia Court of Appeals. Petitioner does assert in his second claim that he received ineffective assistance of counsel at trial but makes no claim that his attorneys erred in their decision not to raise this issue on direct appeal.

Petitioner has presented no evidence to show cause to excuse the default. Therefore, the Court need not address the merits of petitioner's defaulted claims.

B. Failure to Disqualify Entire Jury Panel and Declare Mistrial Following Prejudicial Remarks By a Juror

In grounds two and six, petitioner alleges that the trial court erred in failing to disqualify the entire jury panel and declare a mistrial following a remark by a prospective juror. During jury selection, the court asked the jurors as a group to indicate by a show of hands whether they had formed an opinion about the case. (Resp. Ex. 4A at 464). Those responding affirmatively were asked individually whether each could "lay aside your impression or opinion and render a verdict based on the evidence presented in court?" Id. at 465. Those saying they could not lay aside their opinion were excused by the court. Juror Jennie Stephens responded: "From what I have heard I believe he's guilty but I could be proven wrong." Id. at 468. The trial court informed Ms. Stephens that a yes-no response was expected, not her opinion of respondent's guilt or innocence, and excused her for cause. Id.

Respondent's counsel moved for a mistrial. Id. at 468-70, 477-78. The court denied petitioner's motion and gave extensive curative instructions. Id. at 470, 478-79. The court then asked each panel whether there was "any reason that any one of you know that you could not be a fair and impartial juror in this case," and whether they could decide the case based on the evidence. No one responded to either question. Id. at 479. Both the petitioner and his counsel were then allowed to ask questions of the remaining jurors. Defendant did not challenge for cause any of those jurors.

At the conclusion of voir dire, the trial court noted that 51 jurors were questioned. Eight had formed opinions about the case. Of those eight, five indicated they could not set aside their opinion and were excused for cause. The defendant was given 20 strikes and the prosecutor was given 10. Id. at 504. However, after the jury was struck, one

person who had indicated that she had previously formed an opinion in the case but could set it aside remained on the jury.

In his direct appeal, petitioner asserted trial court error for refusing to disqualify the entire jury panel due to Ms. Stephens' remark. The Georgia Court of Appeals determined that "the statement was not inherently prejudicial, and the court gave extensive curative jury instructions and then very carefully determined that the remark had no prejudicial effect." *Scott*, 177 Ga. App. at 476-77, 339 S.E.2d at 721.

"Due process means a jury capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217 (1982); *Rogers v. McMullen*, 673 F.2d 1185, 1189 (11th Cir. 1982). "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. . . . This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961) (citations omitted). "[A] trial court's finding of impartiality of the jury as a whole can be overturned only for 'manifest error.'" *Patton v. Yount*, 467 U.S. 1025, 1031 (1984); *Irvin v. Dowd*, 366 U.S. at 723.

Here the court gave extensive curative instruction and questioned the jury to determine that the remark had no prejudicial effect. (Resp. Ex. 4A at 478-79). Petitioner has not shown that the trial court's conclusion of no prejudicial effect was a manifest error. "The fact that petitioner did not challenge for cause any of the jurors so selected is strong evidence that he was convinced the jurors were not biased and had not formed any opinions as to his guilt." *Beck v. Washington*, 369 U.S. 541, 557-58 (1962). Therefore, petitioner's assertion that the trial court's refusal to disqualify the entire jury panel denied him of the right to a trial before a fair and impartial jury is without merit.

C. Denial of Independent Psychiatrist

Petitioner alleges in grounds three and seven of his federal habeas petition that the trial court erred in refusing to appoint him an independent psychiatrist. In his brief, petitioner claims that under *Ake v. Oklahoma*, 470 U.S. 68 (1985), he should have been appointed an independent psychiatrist "to reduce the prejudicial effects of Dr. Donald Grigsby's hostile testimony." Petitioner further asserts that he did make a showing that his sanity was an issue at the time of trial.

In *Ake*, the court held that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the state must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. *Id.* at 83. The court further explained that "[t]his is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed." *Id.* Thus, as the state Court of Appeals recognized, Ake does not require the appointment of a psychiatrist to allow the defense to "go on a fishing expedition." *Scott v. State*, 177 Ga. App. at 474-75, 339 S.E.2d at 719.

Petitioner's case differs from Ake in that there was no evidence presented to the trial court to show that petitioner had ever been insane or severely mentally disturbed, and counsel made no showing that appointment of an independent psychiatrist would be helpful to petitioner in any way other than to show that Dr. Grigsby was biased. *Scott*, 177 Ga. App. at 474-75, 339 S.E.2d at 719-20. The Magistrate Judge concludes that petitioner failed to make a preliminary showing to the trial court that his sanity at the time of the offenses in question would be a significant factor at trial; therefore, the trial court's refusal to appoint an independent psychiatrist did not result in a fundamentally unfair trial.

D. Ineffective Assistance of Counsel

Petitioner also claims that he received ineffective assistance of counsel due to his attorneys' failure to place evidence before the trial court to support his motion for change of venue (ground five), his attorneys' failure to subpoena character witnesses for use to present a good character defense in mitigation of punishment and in support of an insanity defense (ground eight), and his attorneys' failure to notify the trial court that two jurors had slept during the trial (ground nine). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Petitioner must overcome the strong presumption that counsels conduct falls within the wide range of reasonable professional assistance. *Id.* at 689.

Counsel's performance is assessed using the two-prong test enunciated in *Strickland*, *supra*. Petitioner must first show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88. Petitioner also must show "there is a reasonable probability that, but for counsels unprofessional errors, the results of the proceeding would have been different." *Id.* at 694. This Court need not address the two elements in any particular order, nor need it consider both if petitioner fails to prove one element. *Id.* at 697.

Furthermore, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. "[I]n the context of a criminal trial, the standard is whether a juror, absent the errors, would have had a reasonable doubt concerning the guilt of the accused." *Chatom v. White*, 858 F.2d 1479, 1486 (11th Cir. 1988).

The record clearly establishes that petitioner acted as at least co-counsel in his case, and at one point insisted that he be allowed to act as lead counsel. (Resp. Ex. 4A at 443-45, 611-13). At one point during the first day of petitioner's trial, the following exchange occurred between petitioner and the court:

PETITIONER: [I] was appointed these lawyers and I have so chosen to defend and aid in my defense as well, so it does not necessarily make Mr. Hasty lead attorney. They were appointed to me by the state to assist me in the case.

THE COURT: Yes, sir.

PETITIONER: And I have so appointed Mr. Hasty to be in command in this case but any time I, for the record, I would like to assume that position that I feel like the court should not deny me that.

THE COURT: You're representing yourself in the case and you are certainly welcomed to do that. You are welcomed to take any role you want in your representation.

PETITIONER: So therefore I ask it to be stricken from the record, Mr. Hasty being lead attorney.

THE COURT: You are representing yourself. You want one lawyer in the case you can represent yourself in whatever capacity you want to represent yourself.

. . . .

PETITIONER: I ask . . . that I am lead attorney in this case. I am defending myself which I am very capable of doing . . . .

Id. at 612-13. See also, Id. at 259-60. At petitioner's state habeas hearing attorney Seals testified that "Mr. Scott pretty well was in charge of the trial. Mr. Hasty and I would try to advise Mr. Scott but Mr. Scott would inform us what he wanted to do and what tactics he wanted to use and how he wanted the trial conducted." (Resp. Ex. 4 at 93). Mr. Seals testified that petitioner cross-examined the victims against the advice of

Mr. Hasty and himself. Petitioner called two detrimental witnesses, Dr. Grigsby and a Muscogee County Jail nurse practitioner, against their advice. Id. at 93.

Petitioner's first allegation in support of his claim of ineffectiveness that trial counsel erred in failing to place evidence before the trial court to support his motion for change of venue.

The record shows that petitioner's co-counsel did move for change of venue following voir dire of the jury. (Resp. Ex. 4A at 501-04). The evidence presented in support of petitioner's motion consisted only of the responses of the jurors during voir dire indicating whether they had read or heard information concerning the case and, if so, whether they had formed an opinion about the case. Id. Attorney Hasty testified at petitioner's state habeas hearing that answers given during voir dire were relied upon because "to get a change of venue, you've got to find . . . a sufficient number in your panels that say they know too much and cannot give a fair and impartial trial. . . . [T]here wasn't a sufficiently large number who have said that they have heard enough or said anything or had heard anything about-the publicity to warrant changing venue. So the judge denied it." (Resp. Ex. 4 at 54).

The Eleventh Circuit has articulated two benchmarks for evaluating allegations of pretrial publicity in requests for change of venue. *Cummings v. Dugger*, 862 F.2d 1504, 1509 (11th Cir. 1989). The first of these, actual prejudice, requires a showing that "one or more jurors, who decided the case entertained an opinion before hearing the evidence adduced at trial, that the defendant was guilty," and that these jurors "could not have laid aside these pre-formed opinions and 'render[ed] a verdict based on the evidence presented in court.'" *Coleman v. Zant*, 708 F.2d 541, 544 (11th Cir. 1983). The second, presumed prejudice, requires a showing that the pretrial publicity was sufficiently prejudicial and inflammatory and that the prejudicial publicity saturated the community where the trial was held. *Id.* Petitioner appears to argue both standards.

To establish actual prejudice, petitioner argues that "the court could not help but notice the prospective jurors' prejudice." As discussed

in part B above, the trial court determined that the jurors selected could remain impartial and put aside any prior opinions following individual questioning of each prospective juror who was exposed to pretrial publicity. "[D]eference must be paid to the trial judge's decision regarding the partiality of an individual juror because of the credibility decision involved." *Cummings*, 862 F.2d at 1510 (citing *Patton v. Yount*, 467 U.S. 1025, 1031 n. 7 (1984)). As previously noted, petitioner has failed to show that he was denied trial by a fair and impartial jury. Petitioner, therefore, has failed to establish actual prejudice from his trial attorneys' alleged failure to provide evidence to support his motion for change of venue.

Furthermore, the Magistrate Judge concludes that petitioner has failed to meet the presumed prejudice standard. Prejudice is presumed from pretrial publicity when (1) pretrial publicity is sufficiently prejudicial and inflammatory, and (2) the prejudicial pretrial publicity saturated the community where the trials were held. *Rideau v. Louisiana*, 373 U.S. 723, 726-27 (1963). Petitioner bears the extremely heavy burden of demonstrating such prejudice. *Cummings*, 862 F.2d at 1509.

A presumed prejudice claim requires "an extensive evidentiary showing to warrant relief" and an assessment of the "totality of the circumstances." *Coleman v. Kemp*, 778 F.2d 1487, 1491 (11th Cir. 1985). The principle is rarely applicable and relief granted only in "extreme situations." *Id.* at 1537. "Voir dire, conducted in an effective manner, may be sufficient to rebut the presumption of prejudice arising from a community saturated with negative pretrial publicity." *Cummings*, 862 F.2d at 1506 n. 6.

Petitioner has submitted 11 exhibits consisting of articles clipped from newspapers in support of his federal habeas petition. Of these articles, only exhibits 1 through 5 are relevant to petitioner's present claim. Exhibits 6, 8, 9, and 11 were not available as evidence in support of petitioner's motion for change of venue because they were published subsequent to the trial court's consideration and denial of petitioner's motion. Due to the dates that Exhibits 9 and 11 were published, the jury could not have seen them prior to rendering their verdict. The articles in exhibits 7 and 10 do not show on their faces that they were published in

the local newspaper, and petitioner has provided nothing to authenticate them. Therefore, these exhibits have no relevancy.

The fact that a number of small stories may have appeared in the media, even in a small community, is not determinative. See, e.g., *Coleman*, 778 F.2d at 1538. Petitioner has failed to show any of the facts considered important in *Coleman*. Overwhelming showing in the press of petitioner's guilt, publicity calculated to provoke hostility or reflective of an atmosphere of hostility, publication of facts not admissible at trial. See, *Id.* at 1538-40. In sum, petitioner has presented no evidence of a community predisposed as to guilt.

Many of the prospective jurors had no prior knowledge of the events of the persons involved. Those who did have some prior knowledge were questioned as to their ability to render a verdict based solely upon the evidence adduced at trial. Those who could not offer reasonable assurance as to such were dismissed for cause.

Based on the foregoing, the Magistrate Judge concludes that petitioner has shown neither actual prejudice nor presumed prejudice from the denial of his motion for change of venue. Accordingly, petitioner has not shown that he was prejudiced by trial counsels' alleged failure to present evidence in support of his motion for change of venue.

Petitioner's remaining claims allege ineffective assistance of counsel during his trial. Petitioner claims in ground eight that his attorneys failed to subpoena character witnesses in support of an insanity defense and in mitigation of punishment.

At petitioner's state habeas hearing, his trial attorneys testified that they initially pursued an insanity defense, but later decided against an insanity defense because they felt the available evidence was insufficient to go forward with an insanity defense, and the court would not appoint a second psychiatrist for an independent evaluation. (Resp. Ex. 4 at 5355). Counsel additionally testified that petitioner was not interested in pursuing an insanity defense. Id. at 55, 94. Mr. Seals testified that with the report from Dr. Grigsby, "plus Mr. Scott's ability to cooperate and

not only assist in his own defense, but in effect control his own case, this sort of made that defense difficult." Id. at 94.

Thus, the record shows that attorneys Hasty and Seals adequately investigated to determine whether to pursue a plea of insanity and reasonably concluded that the evidence did not support such a defense. Since the available medical evidence did not support the idea that petitioner did not know right from wrong at the time of the offense, counsel made a tactical decision not to pursue the insanity defense.

Furthermore, the record demonstrates that petitioner was not prejudiced by counsels failure to subpoena character witnesses in support of a defense of insanity. Petitioner has presented no evidence to show that character witnesses existed who could have testified favorably for him prior to sentencing. Mr. Hasty testified at the state habeas hearing that he and Mr. Seals elected not to call two witnesses named by petitioner because petitioner would not tell them what they would testify to, or how they would assist in his trial. Id. at 50-51. Counsel made a tactical decision based upon the information supplied them by petitioner. Petitioner has failed to establish either that counsels decision here was deficient or that petitioner suffered some resultant prejudice. This allegation is therefore without merit.

Petitioner also claims that his counsel were ineffective because they failed to inform the trial court that two jurors were asleep during petitioner's trial. Petitioner provides only the mere assertion that two jurors were asleep during some part of his three-day trial in support of this claim. The record provides no basis in fact for petitioner's speculative assertion and, therefore, offers no support for a charge of ineffective assistance.

The record shows that petitioner acted as at least cocounsel in his trial and at one point assumed the role of lead counsel. (Resp. Ex. 4 at 39, 49-50, 93; Resp. Ex. 4A at 44345; Resp. Ex. 4B at 611-13). Petitioner has not explained why he failed to call the trial court's attention to the alleged sleeping jurors himself and has not shown that attorneys Seals or Hasty were aware of the alleged sleeping jurors. Petitioner,

therefore, has made no showing of attorney error, and the Court need not determine whether counsels conduct was ineffective.

RECOMMENDATION

Based upon the foregoing discussion, it is hereby recommended that Richard L. Scott's petition for a writ of habeas corpus be **DENIED**.

AND IT IS SO RECOMMENDED this 6th day of Feb., 1992.

/s/
ALLEN L. CHANCEY, JR.
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

RICHARD L. SCOTT,	)	
	)	
Petitioner,	)	
	)	CASE NO. 3:91-CV-39-GET
v.	)	
	)	
BARRY GAITHER, Warden,	)	
Ware Correctional Institution,	)	
Waycross, Georgia,	)	
	)	
Respondent.	)	

ORDER

The above-styled matter is presently before the court on the Magistrate Judge's Report and Recommendation ("R & R") denying the petitioner Richard L. Scott's application for habeas corpus relief pursuant to 28 U.S.C. § 2254.

On February 20, 1985, the petitioner was convicted of four counts of kidnapping, two counts of armed robbery, two counts of burglary and one count of aggravated assault arising out of the petitioner's October 8, 1984 encounter with Joe and Steven Bradfield and the petitioner's October 13, 1984 encounter with the Hart family. Petitioner was subsequently sentenced to two consecutive life sentences plus one hundred and forty years on these offenses. After his conviction, the petitioner, through counsel, pursued direct appeal of his conviction and sentence but was unsuccessful. See *Scott v. State*, 177 Ga. App. 474, 339 S.E.2d 718 (1985) *cert. denied*. Petitioner subsequently filed a state habeas corpus action in the Superior Court of Tattnall County. After a hearing, the court denied habeas corpus relief to the petitioner in an order

dated October 8, 1988. The Georgia Supreme Court has since denied the petitioner's application for a certificate of probable cause to appeal. Petitioner then filed the instant petition for federal habeas corpus relief ultimately pursuing 9 grounds. The Magistrate Judge, in his R & R, denied petitioner's application and Scott raises four objections to that R & R. Accordingly, this court is required to conduct a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. 28 U.S.C.A. § 636 (b)(1)(C) (West Supp. 1991).

In his first objection, enumerated "Ground One", the petitioner alleges that the Magistrate Judge committed error when he refused to examine the merits of petitioner's claim that he did not receive a fair and impartial trial after the judge denied his motion to change venue. Petitioner contends that the pretrial publicity was so pervasive that it created an inherently prejudicial atmosphere.

This ground was not raised in the petitioner's direct appeal. Rather, the petitioner first raised this ground in his state habeas corpus action where the state court found the petitioner procedurally barred from litigating the issue by the holding of *Black v. Hardin*, 255 Ga. 239, 336 S.E.2d 754 (1985) which would require Scott to make an adequate showing of cause for his failure to pursue the issue on direct appeal and actual prejudice from the alleged error. Based upon this record, the Magistrate Judge found that he was unable to consider the merits of the petitioner's argument. Specifically, the Magistrate Judge found that the Supreme Court's holding in *Wainwright v. Sykes*, 433 U.S. 72 (1977), required him to abide by the Georgia state court's proper application of a state-imposed procedural bar where Scott had failed to present any evidence which would show adequate cause to excuse Scott's procedural default.

In various ways, the petitioner argues that the rule of *Wainwright v. Sykes* should not be applied to his case. However, upon review of the record, the court finds that the Magistrate Judge's application of the pertinent law to the facts of petitioner's case is correct and that petitioner's arguments in this regard are without merit.

The petitioner's second objection goes to the Magistrate Judge's finding that the trial court committed no error when it refused to excuse the entire jury panel. The petitioner contends that he was denied a fair and impartial jury after the trial court refused to excuse the entire jury panel following one juror's improper remark. Essentially, the juror had remarked that, based upon what she knew of the case, she had previously formed the opinion that the defendant was guilty but that she could be persuaded otherwise.

The Magistrate Judge noted that the trial court judge gave extensive curative instructions following the remark and that the trial court then proceeded to question the panel to ensure that the remark had no prejudicial effect. After quoting the applicable standards from Supreme Court precedent, the Magistrate Judge determined that there was no error in the trial court's refusal to disqualify the entire jury panel. Having reviewed the record, the court finds that the Magistrate Judge's determination in this regard was correct.

Petitioner's next objection to the Magistrate Judge's R & R goes to the Magistrate Judge's determination that the trial court's refusal to appoint an independent psychiatrist did not render the petitioner's trial fundamentally unfair. The Magistrate Judge noted that *Ake v. Oklahoma*, 470 U.S. 68 (1985), requires a State to assure a defendant access to a competent psychiatrist to assist in preparation of an insanity defense where the defendant has demonstrated to the trial judge that his sanity at the time of the offenses would be a significant factor at the trial. The Magistrate Judge then found that because the petitioner had failed to make the required preliminary showing to the trial court that his sanity would be a significant factor at the trial, there was no error in the trial court's refusal to appoint an independent psychiatrist. This court finds no error in the Magistrate Judge's determination in this regard. Accordingly, the court finds that the petitioner's third objection is without merit.

Although not altogether clear, it appears that the petitioner's final allegation of error goes to the Magistrate Judge's finding that the two attorneys appointed to represent the petitioner both at trial and on appeal were not ineffective within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984). Petitioner offers the following as support for his

contention that appointed counsel was ineffective: (1) Petitioner had led an exemplary life prior to the incidents which occurred herein and had witnesses who could have testified as to his good character but counsel refused to present that evidence; (2) petitioner had a mental disorder which caused him to deviate from normal behavior but counsel refused to pursue an insanity defense; and (3) despite pervasive pre-trial publicity, counsel failed to pursue that issue on appeal. The court, having reviewed the record, finds that the Magistrate Judge's R & R contains a detailed and thorough discussion and evaluation of each of the allegations raised by petitioner. The court further finds that the Magistrate Judge's determinations made with respect to the petitioner's allegations of ineffective assistance of counsel are correct. Accordingly, the court finds that petitioner's objections to this portion of the Magistrate Judge's R & R are without merit.

For the reasons stated above and in the R & R which is incorporated herein and made a part of this order by reference, the court hereby ADOPTS the Magistrate Judge's R & R and DENIES the petitioner Richard L. Scott's application for habeas corpus relief pursuant to 28 U.S.C. § 2254.

SO ORDERED, this 15th day of July, 1992.

/s/
G. ERNEST TIDWELL
JUDGE, UNITED STATES DISTRICT COURT

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

RICHARD L. SCOTT,	)	
	)	
Petitioner,	)	
	)	CASE NO. 3:91-CV-39-GET
v.	)	
	)	
BARRY GAITHER, Warden,	)	
Ware Correctional Institution,	)	
Waycross, Georgia,	)	
	)	
Respondent.	)	

ORDER

By order filed July 17, 1992, this court adopted the Magistrate Judge's Report and Recommendation denying the petitioner's motion for a writ of habeas corpus. The petitioner now moves, pursuant to 28 U.S.C. § 2253, for a certificate of probable cause to appeal the July 17, 1992 order. In addition, the petitioner seeks leave to appeal in forma pauperis.

The Supreme Court has articulated the standard for issuance of a certificate of probable cause as follows:

> In requiring a "question of some substance," or a "substantial showing of the denial of [a] federal right," obviously the petitioner need not show that he should prevail on the merits. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are

> "adequate to deserve encouragement to proceed further."

Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983).

In the instant case, the petitioner raises six allegations of constitutional error which he wishes to pursue upon appeal. However, viewing the petition in the light established in *Barefoot* and after careful review of the relevant law as well as the issues, record and factual determinations made in the case, this court concludes the petitioner has not demonstrated that the issues he has raised are debatable among jurists of reason; or that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further. Accordingly, petitioner's motion for a certificate of probable cause [Docket Item No. 20] is DENIED.

Based upon the foregoing, the petitioner's motion to proceed in forma pauperis [Docket Item No. 21] is DENIED as MOOT.

SO ORDERED, this ___ day of December, 1992.

/s/
G. ERNEST TIDWELL
JUDGE, UNITED STATES DISTRICT COURT

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 92-8804

RICHARD L. SCOTT,

Petitioner-Appellant,

versus

DODGE CORRECTIONAL INSTITUTION,

Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Georgia

ORDER:

Appellant's application for a certificate of probable cause is GRANTED.

Appellant's motion for leave to proceed on appeal in forma pauperis is GRANTED.

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8804

D. C. Docket No. 3:91-cv-39-GET

RICHARD L. SCOTT,

Petitioner-Appellant,

versus

DODGE CORRECTIONAL INSTITUTION,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(February 16, 1995)

Before TJOFLAT, Chief Judge, BIRCH, Circuit Judge and HENDERSON, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.[1]

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[1] 11th Cir. R. 36-1 provides:

When the Court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without reversible error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.